12-1700-10743-2
DHR File Nos. ER19941926
and AA19940071 (Rita Smith)
DHR File Nos. ER19941927
and AA19940072 (Laura Muir)
DHR File Nos. ER19941893
and AA19940069 (Jessica Triplett)

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
David Beaulieu, Commissioner,
Department of Human Rights,

Complainant,

ORDER ON
RESPONDENTS' MOTIONS
FOR SUMMARY DISPOSITION

v.

Jones Manufacturing of Monticello, Inc.,
and Marty Jones,

Respondents.

The above-entitled matter came on for oral argument before Administrative Law Judge Steve M. Mihalchick on January 16, 1997, on Respondents' motions for summary disposition. The record was closed upon receipt of a supplemental letter brief from Complainant on January 17, 1997.

Richard L. Varco, Jr., Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota, 55101-2130, appeared on behalf of Complainant.

Gregory J. Stenmoe, with Donna J. Bailey and Michael M. Jerstad on brief, Briggs and Morgan, 2400 IDS Center, Minneapolis, Minnesota 55402, appeared on behalf of Respondents Jones Manufacturing of Monticello, Inc. (Jones Manufacturing) and Marty Jones.

Based upon the Memoranda filed by the parties, all of the filings in this case, and for reasons set out in the Memorandum that follows, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that Respondents' Motions for Summary Disposition are DENIED.

Dated this 18th day of February, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500 K. Minn.R.Civ.P. 56.03. The Office of Administrative Hearings follows the summary judgment standards developed in the courts when considering motions for summary disposition regarding contested case matters. See, Minn. R. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. ***Illinois Farmers Insurance Co. v. Tapemark Co***., 273 N.W.2d 630, 634 (Minn. 1978); ***Highland Chateau v. Minnesota Department of Public Welfare***, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. ***Thiele v. Stitch***, 425 N.W.2d 580, 583 (Minn. 1988); ***Hunt v. IBM Mid America Employees Federal***, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. ***Id***.; ***Murphy v. Country House, Inc***., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); ***Carlisle v. City of Minneapolis***, 437 N.W.2d 712, 715 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. ***Carlisle***, 437 N.W.2d at 715 (citing, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. ***Ostendorf v. Kenyon***, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the

moving party. See, e.g., ***Celotex***, 477 U.S. at 325; ***Thiele v. Stich***, 425 N.W.2d 580, 583 (Minn. 1988); ***Greaton v. Enich***, 185 N.W.2d 876, 878 (Minn. 1971); ***Thompson v. Campbell***, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 250-51 (1986).

Facts for Purpose of Motions

While they vigorously deny the allegations of sexual harassment and reprisal, for purposes of these motions only, Respondents accept the allegations made in the Complaint as true. In addition to accepting the allegations as true for purposes of the motions, Respondents have supplemented their argument with testimony and exhibits from depositions. Complainant has likewise supported its arguments with affidavits. Construing the evidence presented in the light most favorable to Complainant, and for purposes of these motions only, the following facts are assumed to have existed.

Jones Manufacturing is a corporation owned by Edward, John, Robert and Marty Jones, who are brothers. In addition to a manufacturing business, it owns and operates a small retail jewelry store in Monticello, Minnesota, named Classique Jewelry. Edward Jones is the president of the corporation; Marty Jones is the manager of Classique Jewelry.

Rita Smith, Laura Muir, and Jessica Triplett are women who worked for Respondents at Classique Jewelry at various times from 1991 to 1994. Throughout their employment at Classique Jewelry, they were subject to unwelcome sexual advances, requests for sexual favors, and other verbal communications of a sexual nature by Marty Jones. Submission to that contact and those communications was a term or condition of their employment and was used as a factor in decisions affecting their employment. The conduct and communication had the purpose and effect of substantially interfering with their employment and created an intimidating, hostile and offensive employment environment. Jones Manufacturing knew or should have known of the harassment and failed to take timely and appropriate action in response.

Triplett worked at Classique Jewelry from September 11, 1993, until October 11, 1993, which was her last day of work. Marty Jones did not work Mondays and October 11, 1993, was a Monday. The last time Triplett worked with Marty Jones was October 9, 1993. On October 15, 1993, Triplett submitted a written resignation to Marty Jones at Classique Jewelry. Triplett had concluded by that time that she had been sexually harassed by Marty Jones and would continue to be subjected to sexual harassment by him if she remained employed.

Muir worked at Classique Jewelry from about October 20, 1993, to December 20, 1993. On that date, Muir resigned after concluding that she had been sexually harassed by Marty Jones and would continue to be subjected to such treatment if she remained at Classique Jewelry.

Smith was employed by Jones Manufacturing at Classique Jewelry from about November 4, 1991, through May 3, 1994. On April 28, 1994, Smith spoke with Edward Jones about a written vulgar joke she recently had been given by Marty Jones. She also complained about Marty Jones' other inappropriate behavior. Edward Jones asked

her to return that afternoon to speak with him, John Jones, and Robert Jones. During that subsequent discussion, she informed the three of them that Triplett and Muir had left because of the way Marty Jones had talked to them and acted toward them. At that point, John Jones started yelling at her, saying, "That's all hearsay" and "What do you know?" After some further discussions, Smith left the meeting and Edward, John and Robert Jones called Marty Jones in to meet with them. Later that day, Edward Jones told Smith that they would work things out and that she should come back to work on Monday morning, May 2, 1994.

On May 2, 1994, Smith went to work and began putting out the jewelry as normal. Just before 9:00 a.m., Marty Jones came in, despite the fact that he normally did not work Mondays. He told her that she could not work there until he talked to her. He then directed her into John Jones' office. In there, he asked her "What's the problem?" She told him how some of the things he did hurt her and the other women. He told her that she had no business talking to his brothers about anything. He called her a liar and pathetic. When she said she was not and that he was the liar, he yelled at her and told her that if she didn't like it there she could leave. She asked him if his brothers had any say in whether she left or not. He told her they did not, that he was the manager of the store.

Before leaving for home following her meeting with Marty Jones, Smith was informed by Edward Jones that he was going to try to set up a meeting the following day with her, a co-worker, John Jones, Robert Jones, and Smith's husband. That meeting never occurred. Instead, on May 3, 1994, Smith was informed in a telephone conversation with John Jones that because she and Marty Jones "had a personality conflict" she "could no longer work there." She asked him if that meant she was fired and he said that he was sorry, but Marty Jones was the manager of the store.

On October 11, 1994, Triplett's mother, Jeanette Triplett, filed charges of discrimination against Jones Manufacturing and Marty Jones with the Minnesota Department of Human Rights on behalf of Triplett. On October 17, 1994, Muir and Smith filed charges of discrimination against Jones Manufacturing and Marty Jones with the Minnesota Department of Human Rights.

The Department of Human Rights investigated the allegations in the charges. On February 16, 1996, Jones Manufacturing and Marty Jones were notified that the Commissioner of Human Rights had found that there was probable cause to believe the allegations of Muir, Triplett, and Smith, that Jones Manufacturing and Marty Jones had engaged in unfair discriminatory practices.

Statute of Limitations

Minn. Stat. § 363.06, subd. 3, requires a claim of unfair discriminatory practice to be brought as a civil action, filed as a charge with the local Human Rights Commission, or filed in a charge with the Commissioner of Human Rights within one year after the occurrence of the practice. The last day Triplett worked with Marty Jones was Saturday, October 9, 1993. She is uncertain whether he engaged in any conduct she considered sexual harassment on that specific day, but testified that his sexual and personal comments and questions and incidents of brushing his body against her continued throughout the just over four weeks she worked there. She worked on

Monday, October 11, 1993, when Marty Jones was not present. She missed work the next three days and then came in on Friday, October 15, 1993, to inform Marty Jones that she was quitting. She then filled out a written resignation on which she left the reason for leaving blank. When Marty Jones asked her why she hadn't answered that question, she told him because she believed she had been sexually harassed. As Triplett left the store, she told Marty Jones that she would see him in court.

Respondents argue that because the last possible incident of harassment by Marty Jones would have been October 9, 1993, Triplett's claims are barred because of the fact that the charge was not filed on her behalf with the Department of Human Rights until October 11, 1994.

An exception to the one-year statute of limitations is the doctrine of continuing violation, which may apply when the unlawful employment practice manifests itself over time, rather than as a series of discreet acts. ***Giuliani v. Stuart Corp***., 512 N.W.2d 589, 595 (Minn. App. 1994), citing ***Lane v. Ground Round***, 775 F.Supp. 1219 (E.D. Mo. 1991). The rule is that to establish a continuing violation, a plaintiff must show that at least one incident of harassment occurred within the limitations period. The question is whether a reasonable person would feel that the environment was hostile throughout the period that formed the basis of the discrimination claim. ***Lane***, 775 F.Supp. at 1224-1225. In ***United Airlines, Incorporated v. Evans***, 431 U.S. 553, 97 S.Ct. 1885, 52 L.E.D.2d 571 (1977), the U.S. Supreme Court decided that the mere continuing effect on a plaintiff of past discrimination was not sufficient to support a continuing violation; rather, some present violation (one within the charge-filing period) must exist. However, the present violation may consist of the employer continuing a policy or failing to correct an illegal policy, if that affects the plaintiff. ***Reed v. Lockheed Aircraft Corporation***, 613 F.2d 757 (9th Cir. 1980); ***Domingo v. New England Fish Company***, 727 F.2d 1429 (9th Cir. 1984).

In the case of employment terminated by a constructive discharge, "the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date." ***Olson v. Rembrandt Printing Co.***, 511 F.2d 1228, 1234 (8th Cir. 1975). Constructive discharges are effective the date that the notice of unconditional resignation is given. It is not the last day worked, unless that happens to be the same date. ***Lowell v. Glidden-Durkee***, 259 F.Supp. 17 (N.D.Ill. 1981).

Complainant argues that the last date on which Marty Jones and Jones Manufacturing could have discriminated against Triplett was October 11, 1993, because, on that date, she decided she would resign from Jones Manufacturing and that on that date she was constructively discharged. Complainant's Memorandum at 5-6. The Administrative Law Judge agrees that Jones Manufacturing's discrimination continued through the date of the constructive discharge, but does not agree that the constructive discharge occurred on October 11, 1993. When asked when she decided to resign from Classique Jewelry, Triplett testified as follows:

> A. The 11th of October. Actually probably the last day I worked with Marty.
>
> Q. That would have been -

A. The 9th.

Q. The 9th. You didn't tell him that day, though, that you were going to resign?

A. No.

Triplett Deposition T. 77. Thus, Triplett had made a tentative decision to resign sometime on Saturday, October 9, 1993. But, Triplett's decision, even if it had been firmly and finally made in her own mind, is not the triggering event for the statute of limitations. There must be an unconditional termination or resignation with notice to the other party. ***Wangen v. City of Rochester***, unpublished opinion C2-96-1617 (Minn. App. January 28, 1997) (a letter from an employee who had repeatedly complained about a hostile working environment stating that he would not be reporting for work was not a letter of resignation because it did not particularly and definitely so state).

In employment discrimination cases involving the actual discharge of an employee by an employer, Minnesota has adopted the federal rule that where an unequivocal, unconditional notice of termination is given, the statute of limitations begins to run from the time the notice of termination is received by the employee, rather than from the date the employee last works. ***Turner v. IDS Financial Services, Inc.***, 471 N.W.2d 105 (Minn. 1991). ***Turner*** and similar cases involve a situation where notice of termination is given and the employment ends a short period after the notice. In this case, Triplett gave the notice a short period after the last day she actually worked. But the results should be the same; the statute of limitations is triggered by receipt of the notice of resignation. That is because Triplett remained an employee until October 15, 1993, the day she resigned. Prior to that, nothing had happened that terminated her employment. On Saturday, October 9, she worked with Marty Jones and "probably" decided that day that she had to quit because of his conduct. Her next day of work was Monday, October 11, 1993. She worked her normal evening shift, so she was an employee through that date. Triplett was scheduled to work Tuesday, Wednesday and Thursday evenings, but didn't go to work. One of those days might be considered the date of termination, but there is no evidence in the record that any communication between Triplett and Jones Manufacturing occurred or that any action was taken by either of them to terminate her employment. On Friday, October 15, 1993, Triplett came into the store and gave notice of her resignation. It was then her employment terminated. It was then that she was constructively discharged by Jones Manufacturing. It was then that the one-year statute of limitations began running.

Triplett's constructive discharge claim is not barred because October 15, 1993, is within one year from the date her charge was filed. Furthermore, the constructive discharge was closely related to the prior events of sexual harassment so as to constitute a continuing violation. Therefore, the prior events are also not barred by the statute of limitations.

Respondents argued at Oral Argument that allowing a constructive discharge to trigger the time limit could lead to absurd results and abuses where an employee waits for extended periods before resigning. The requirements for a constructive discharge preclude such results; an employee waiting an extended period after harassment had

ceased before quitting would have a difficult time showing it was a constructive discharge.

Apart from the constructive discharge, Jones Manufacturing's failure to take timely and appropriate action to correct the existing sexual harassment continued through October 11, 1993, Triplett's last day of work. Jones Manufacturing did nothing to eliminate the harassment. The final day of that failure was within the one-year statute of limitations and, again, was part of a continuing violation, thereby bringing all the prior incidents within Triplett's claim. ***Crighton v. Schuylkill County***, 882 F.Supp. 411 (E.D.Penn. 1995) (alleged incidents constituting a continuing violation involved sexual harassment or defendants' failure to act); ***August v. Star Enterprise, Inc.***, 899 F.Supp. 1540, 1543 (E.D.La. 1995) (the statute of limitations does not commence "until the last act occurs or the conduct is abated.").

Aiding and Abetting by Marty Jones

Complainant has alleged that Marty Jones aided, abetted, compelled and coerced Jones Manufacturing to violate the Minnesota Human Rights Act by sexually harassing Muir, Triplett, and Smith, by constructively discharging Muir and Triplett, and by terminating Smith's employment, and thereby violated Minn. Stat. § 363.03, subd. 6. That statute makes it an unlawful discriminatory practice for any "person" intentionally to or intentionally to attempt to "aid, abet, incite, compel, or coerce a person" to engage in any of the practices forbidden by the Minnesota Human Rights Act. Respondents argue that the aiding and abetting claims against Marty Jones must be dismissed because the aiding and abetting provision does not apply to individuals and because one cannot aid and abet one's own conduct.

Minn. Stat. § 363.01, subd. 28, contains the definition of "person" for the purposes of the Minnesota Human Rights Act. It states:

> "Person" includes partnership, association, corporation, legal representative, trustee, trustee in bankruptcy, receiver, and the state and its departments, agencies, and political subdivisions.

Respondents argue that this definition of "person" excludes "individual" and means, instead, an "employer" or other like entity. One court has so held and thereby concluded that aiding and abetting claims under Minn. Stat. § 363.03, subd. 6, are limited to "persons", that under Minn. Stat. § 363.03, subd. 1(2)(c) unfair discriminatory practices are limited to claims against employers and that therefore the plaintiff in the case had no claims under the Minnesota Human Rights Act against her supervisor who she alleged sexually harassed her. ***Gordon v. Roadway Express, Inc.***, Ct. File No. C6 918995 (Minn. Dist. Ct. May 18, 1993). The Administrative Law Judge respectfully declines to follow that decision. In the first place, the definition of "person" in Minn. Stat. § 363.01, subd. 28, does not exclude "individual" from the definition; on the contrary, it adds the political and business entities to the common meaning of the word "person" as being an "individual". Had it meant to exclude "individual", the definition would have stated "'person' means partnership, ..." As Complainant points out, this common usage of the word "person" also appears in the definition of "person" for the purposes of all Minnesota Statutes at Minn. Stat. § 645.44, subd. 7. Moreover, assuming that Respondents were correct and that the term "person" in the Minnesota Human Rights

Act did not include individuals, what would the several other references to "person" within the Minnesota Human Rights Act mean? For example, Minn. Stat. § 363.03, subd. 7, provides, in part:

> It is an unfair discriminatory practice for any employer, . . . or employee or agent thereof to intentionally engage in any reprisal against any person because that person . . . associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin.

If the definition of "person" does not include individuals, this statute is absurd.

The ***Gordon v. Roadway Express*** court was correct that Minn. Stat. § 363.03, subd. 1(2)(c) limits unfair discriminatory practices to claims against employers, but that is because that particular paragraph of the statute defines unfair employment practices by employers. Other paragraphs and sections define other unfair discriminatory practices. In particular, Minn. Stat. § 363.03, subd. 6, defines the unfair discriminatory practice of aiding and abetting and obstruction.

Respondents cite three federal decisions and argue that they indicate that the Minnesota Human Rights Act does not impose individual liability on supervisors or employees. ***Waag v. Thomas Pontiac, Buick, GMC, Inc.,*** 930 F.Supp. 393, 407 (D.Minn. 1996); ***Smith v. St. Bernard's Regional Medical Ctr.,*** 19 F.3d 1254, 1255 (8th Cir. 1994); ***Breen v. Norwest Bank of Minnesota***, 865 F.Supp. 574 (D.Minn. 1994). However, none of these cases deal with the aiding and abetting clause of the Minnesota Human Rights Act. ***Waag*** specifically addressed the question of whether supervisors could be held personally liable for sexual harassment under Title VII. There was also an issue as to whether there was such liability under the Minnesota Human Rights Act, but because it found that Minnesota courts had not yet considered the issue, the court concluded that the Minnesota Human Rights Act should be construed as offering protection analogous to that provided by Title VII. Thus, the court's analysis was based entirely upon the language of Title VII, not the Minnesota Human Rights Act.

Under Title VII, "employer" is defined as a person with 15 or more employees over a certain period, "and any agent of such a person." 42 U.S.C. § 2000e(b). Under the Minnesota Human Rights Act, "employer" means a person who has one or more employees; the reference to agents in Title VII does not appear. Minn. Stat. § 363.01, subd. 17. In the Title VII cases, the nature of the agency relationship has been examined and several courts held that individuals employed as supervisors or managers with direct control over the affected employee were subject to liability in their official capacities. Larson, **Employment Discrimination** 2d Ed. § 5.03[2][a], n. 15. In 1993, the 9th Circuit concluded that Congress had not intended to impose individual liability on employees and that supervisors and co-workers who had allegedly acted in a discriminatory manner were not subject to personal liability under Title VII. ***Miller v. Maxwell's Int'l., Inc.***, 991 F.2d 583 (9th Cir. 1993), Cert. denied, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.E.D.2d 372 (1994). Since then, a majority of the federal courts have followed ***Miller***. ***Waag***, 930 F.Supp. at 407; Larson, **Employment Discrimination** 2d Ed. § 5.03[2][a] n. 18 (July 1996 Cum. Supp.). ***Waag*** and ***Breen*** followed the majority rule and held that Title VII does impose individual liability on supervisory employees.

Non-supervisory co-employees have only rarely been held to be individually liable under Title VII. ***Smith*** follows that precedent. Larson, **Employment Discrimination**, 2d Ed. § 5.03[2][a] n. 31.

At least 17 states include a clause in their human rights law prohibiting aiding and abetting any violation of that law. Most of the cases arising under the aiding and abetting clauses appear to involve newspapers publishing separate male and female job listings and advertisements that were discriminatory on the face. Larson, **Employment Discrimination**, 2d Ed. § 12.02[3]. It has also been applied to insurance companies that provide employer-paid insurance that illegally discriminates. ***Colorado Civil Rights Com'n v. Travelers Ins. Co.***, 759 P.2d 1358 (Colo. 1988).

The Administrative Law Judge is aware of only one reported case discussing the application of an aiding and abetting clause to a supervisor. In ***Holstein v. Norandex, Inc.***, 194 W.Va. 727, 461 S.E.2d 473 (1995). The court construed the aiding and abetting clause of the West Virginia Human Rights Act, which is substantially identical to Minnesota's. It held that the clause did not limit the potential defendants to employers, and held that a manager could be held liable for his discriminatory actions as a person based upon an allegation that the defendant employee aided or abetted the employer engaging in unlawful discriminatory practices. ***Holstein***, 194 W.Va. at 732, 461 S.E.2d at 478.

In Minnesota, the question of whether the aiding and abetting clause can be applied to supervisors and managers individually has not been decided at the appellate level. In ***State by McClure v. Sports & Health Club, Inc.***, 370 N.W.2d 844, 845 (Minn. 1985), the hearing examiner had "pierced the corporate veil" and held the three individual owners to be, in fact, the corporation. Having done so, the hearing examiner held it was inappropriate to hold the individuals separately liable under the aiding and abetting clause for actions for which the corporation and they had already been held liable. The Supreme Court agreed with that conclusion. In ***State by Beaulieu v. RSJ, Inc.***, 532 N.W.2d 610 (Minn. App. 1995), the Court of Appeals reversed the conclusion of the ALJ that a shareholder and corporate officer of the employer corporation was liable for any award against the corporation because he aided and abetted it in discriminating and engaging in reprisals. The Court of Appeals stated:

> The statutory language provides no reason for making aiding and abetting discrimination an exception to the limitation of corporate liability. As a major shareholder of RSJ, Schaefer is already liable for its discriminatory acts -- the liability of RSJ will inevitably affect its shareholders. *Cf. State by McClure v. Sports & Health Club, Inc.* 370 N.W.2d 844, 854 (Minn. 1985). Thus, we conclude he should not also be held liable as an individual for aiding and abetting those acts.

On appeal, the Supreme Court affirmed the dismissal by the Court of Appeals on other grounds and stated:

> Because we conclude that the aiding and abetting claims against Schaefer are time-barred, we have no need to reach and, therefore, do not decide the issue of whether the court of appeals erred in holding that Schaefer

could not be held personally liable for aiding and abetting discrimination as a shareholder and officer of the corporation.

State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695, Fn. 4 (Minn. 1996).

It is the position of the Department that the aiding and abetting clause may be applied in situations such as this, as is evidenced by the determination of probable cause against Marty Jones. That interpretation of the Minnesota Human Rights Act by the Department is entitled to deference. Similarly, Administrative Law Judges have consistently applied the aiding and abetting clause to high level supervisors actively involved in the unfair discrimination. For example, in ***State by Cooper v T.L.M. Enterprises, Inc.***, Order Denying Motions, OAH Docket No. 8-1700-2837-4, (June 6, 1989), the ALJ stated:

> Under Minn. Stat. § 363.03, subd. 6, it is an unfair discriminatory practice to intentionally aid and abet sexual harassment. In ***Smith v. Hennepin County Technical Center***, Civil No. 4-85-411 (D.Minn. 1988), the United States District Court held that individual administrators have a duty to take prompt and remedial action when they know or should know that employees are being harassed. ***Slip op.*** at 39-40. In addition, the court held that a failure to act under the statute may be sufficient to constitute aiding and abetting. ***id***. at 40-41. The Court noted that a supervisor's failure to act constitutes an abrogation of supervisory duties and that willful blindness to harassment is equivalent to tacit assent to the harassment that occurs. id. at 41. In ***Morgan v. Eaton's Dude Ranch***, 239 N.W.2d 761, 762, the Minnesota Supreme Court had occasion to consider the liability of a corporate officer for the torts committed by a corporate employee stating:
>
> > It is well settled that a corporate officer is not liable for the torts of the corporation's employees unless he participated in, directed, or was negligent in failing to learn of and prevent the tort. * * *
>
> Under these holdings, it is concluded that a corporate officer, like Weber, may be liable for intentionally aiding and abetting sexual harassment perpetrated by a corporate employee when the officer is aware of the harassment and fails to take timely and appropriate steps to remedy the situation.

The Administrative Law Judge concludes that the aiding and abetting clause of the Minnesota Human Rights Act does provide a basis for finding liability against an individual supervisor or manager who aids or abets an employer engaging in unlawful discriminatory practices. The general scheme of the Act is to place the principal burden upon employers for illegal discrimination that occurs in the employment setting. It is also the general scheme of the Act not to assign liability and allow actions against individual co-employees who engage in sexual harassment. However, the aiding and abetting clause clearly imposes liability upon those employees who actively assist in and further an employer's unlawful discriminatory practices. A manager such as Marty Jones is such a person, because he directed the actions and failures of Jones

Manufacturing. Not to impose individual liability on him would render the aiding and abetting clause meaningless.

Respondents also argue that Marty Jones cannot be held liable under the aiding and abetting clause because he cannot aid and abet himself. However, there has been no "piercing of the corporate veil" in this case and Marty Jones is a separate and distinct person from Jones Manufacturing. Marty Jones, the individual and manager, can indeed be said to have aided and abetted Jones Manufacturing, the corporation and employer.

Timeliness of the Department's Probable Cause Determinations

The Department made probable cause determinations on the charges in this matter on February 16, 1996. That was some 16 months after Triplett's charge was filed on October 11, 1994, and Smith's and Muir's charges were filed on October 17, 1994. Respondents argue that they are entitled to dismissal of the charges because the probable cause determinations were not made within 12 months after the charges were filed, as required by Minn. Stat. § 363.06, subd. 4(1). Respondents rely upon ***State by Beaulieu v. RSJ, Inc.***, 552 N.W.2d 695 (Minn. 1996). At oral argument, Respondents argued that the Department's delay is exacerbated by the delay of up to a year by the charging parties in filing their charges and by the fact that some of the events occurred more than three and one-half years ago.

In ***RSJ***, the Supreme Court held that the purpose of the 12 month requirement was to expedite resolution of discrimination charges and that when probable cause determinations are delayed, that purpose is frustrated and resolution becomes more difficult because of disappearing evidence, fading memories, and accruing damages. It specifically held that the failure to make probable cause determinations within 12 months was not jurisdictional, but raised equitable defenses to be resolved by the Administrative Law Judge being mindful of the impact on the charging party, minimizing any such impact, and in proportion to the prejudice suffered by the Respondent. In ***RSJ***, the court held that, as a matter of law, probable cause determinations made 31 months or more after a charge is filed were *per se* prejudicial to the Respondent and required dismissal. It also ruled that its determination was to be applied prospectively to all human rights charges filed after the date of the opinion, which was August 29, 1996.

Even applying the ***RSJ*** standards to this case, the equities do not warrant dismissal. The probable cause determination was made within 16 months, a vast improvement over the 31 months it took the department in ***RSJ***. Respondents have not cited any lost memories, evidence, or witnesses to indicate any prejudice in this matter. Most of the allegations in this matter involve incidents occurring from late 1993 to early 1994. That is a period just over three years ago and hardly extraordinary in terms of typical litigation. Respondents are not entitled to dismissal because of the fact the Department was four months late in issuing its determinations of probable cause.

Hostile Workplace Sexual Harassment Claims

The Minnesota Human Rights Act makes it an unfair employment practice for an employer, because of sex, “to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of

employment." Minn. Stat. § 363.03, subd. 1(2)(c) (1996). The Minnesota Human Rights Act defines "discriminate" "for purposes of discrimination based on sex" to include sexual harassment. Minn. Stat. § 363.01, subd. 14 (1996). Sexual harassment includes:

> ... unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to the conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment...;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment...; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment... or creating an intimidating, hostile, or offensive employment ... environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Id. at subd. 41 (1996).

Respondents argue that Complainant has failed to put forth sufficient evidence to support the claims of hostile environment sexual harassment by Triplett and Smith.

The test for determining whether the workplace has become a hostile environment is an objective one based on the totality of the circumstances. ***Harris v. Forklift Systems, Inc***., 114 S.Ct. 367, 371 (1993). According to ***Harris***, factors to be considered in determining whether a reasonable person would find an environment hostile or abusive include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." ***Id***. In addition, the victim must have "subjectively" perceived the environment to be hostile or abusive in order to prevail. ***Id.*** at 370. A discriminatory abusive work environment may exist where the harassment caused economic injury, affected the employee's psychological well-being, detracted from job performance, discouraged an employee from remaining on the job, or kept the employee from career advancement. ***Id***. at 371.

Respondents have cited ***Continental Can Company v. State,*** 297 N.W.2d 241 (Minn. 1980) and ***Klink v. Ramsey County***, 397 N.W.2d 894 (Minn. App. 1986), in support of their argument that Marty Jones' alleged offensive comments are not enough to support Complainant's claims of sexual harassment. In ***Continental Can***, the Minnesota Supreme Court made clear that an employer has no duty to maintain a pristine work environment. ***Id***. at 249. Likewise, in ***Klink v. Ramsey County***, 397 N.W.2d at 901, the Minnesota Court of Appeals specifically held that foul language and vulgar behavior alone are not enough to automatically trigger an actionable claim of sex discrimination by a worker who finds such language and conduct in the workplace offensive or repulsive. In ***Klink,*** the plaintiff alleged that she was discriminated against through the creation of an offensive employment environment. However, the evidence

presented at trial demonstrated that the plaintiff merely overheard the use of profanity and other foul language on a sporadic basis in areas outside of her work station. Furthermore, the evidence showed that the profanity and foul language were not directed at the plaintiff. ***Id***.

Unlike ***Klink***, Marty Jones took actions toward Triplett that indicated quite clearly that she was the subject of his sexual desires and that he had an inappropriate interest in the details of her personal life. She found that intimidating, hostile and offensive. Marty Jones' treatment of Smith was similar and involved inquiries about her sexual activities, touching of her hair, and other indications of his sexual desires and fantasies concerning her. Again, she indicated her displeasure to him and found the environment intimidating, hostile, and offensive.

After reviewing the depositions, affidavits and other evidence submitted in consideration of this motion, the ALJ finds that Complainant has put forth sufficient evidence to raise genuine issues of material fact as to the sexual nature of Marty Jones' actions and the hostile or intimidating effect these comments had on Triplett, Smith and Muir.

Smith's Claim of Reprisal

Respondents argue that Smith's claim of reprisal should be dismissed because prior to her termination she had not engaged in any "protected conduct" because she had never taken any action "opposing" a practice forbidden under the Minnesota Human Rights Act.

Viewing the evidence presented in the light most favorable to Complainant, it appears that Smith was fired by Jones Manufacturing and Marty Jones one day after she complained about the incidents of sexual harassment of her and Muir and Triplett by Marty Jones. Taking discrimination claims to management is protected activity. Again, the evidence is sufficient to raise genuine issues of material fact as to whether a reprisal occurred and makes summary disposition of the issue improper.

S.M.M.